

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 18**

UNITED PARCEL SERVICE, INC., Respondent

and

Case No. 18-CA-193426

MARK DAVID HAM, an Individual

**COUNSEL FOR THE GENERAL COUNSEL'S BRIEF
TO THE ADMINISTRATIVE LAW JUDGE**

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I. INTRODUCTION

United Parcel Service, Inc. (Respondent) violated Section 8(a)(1) of the National Labor Relations Act (the Act) by threatening Charging Party David Ham (Ham) with unspecified reprisals because he engaged in activities as shop steward and threatened to file charges with the National Labor Relations Board (the Board). Respondent also violated Section 8(a)(3) of the Act by warning Ham in retaliation for raising concerns about a new bathroom break policy. In both situations, Ham was acting in his capacity as shop steward for Teamsters, Local 238 (Union) representing membership and otherwise enforcing the collective bargaining agreement (CBA) between Respondent and the Union. Because Respondent's actions were in response to Ham's protected concerted activities, the proper framework for analyzing whether or not Ham lost protection during the meetings, is the Board's decision in *Atlantic Steel Co.*, 245 NLRB 814 (1979). While Ham may not have acted "cordially," he did not engage in any threatening behavior, nor given Respondent's tolerance of swear words in the workplace, did he act improperly.

II. FACTS

Since 1994 Mark Ham¹ has worked as a delivery driver at Respondent's Coralville, Iowa facility. During 2009 Ham became a union steward at the facility and has performed the typical functions of shop steward, including representing bargaining unit employees at various meetings with Respondent and acting as a "peacemaker between management and employees." (tr. 33, 37).

¹ Ham's testimony should be credited. He testified in a straightforward and honest manner. When confronted by Respondent with minor differences in his affidavit and testimony, he readily admitted and explained the discrepancy on the Record. (e.g., tr. 185).

A. *February Meetings Leading to Threats of Unspecified Reprisals.*

At the invitation of Respondent and in his capacity as shop steward, Ham represented bargaining unit member Dennis Peer at four separate meetings in February 2017 (all dates 2017 unless otherwise noted) regarding Peer's driving methods and performance. (tr. 40, 41, 242). Methods are certain procedures Respondent expects drivers to perform. (tr. 41). Each of the first four meetings included Ham, Peer, Adam Miller (on-road supervisor), and John Henson (business manager). (tr. 43). At each of these meetings, Ham asked if Respondent intended to issue discipline based on the issues discussed. Each time, either Miller or Henson said, "No." (tr. 45, 47, 49, 51, 234, 239).

On February 10, supervisor Miller accompanied Peer on an annual ride. (tr. 52, 243, 515). Peer testified supervisor Miller told him after the ride he only had two things to work on. (tr. 245, 246). Ham testified Peer had called him later that day to tell him that he only did a couple of things wrong on his ride. (tr. 55).

B. *February 16 Meeting.*

The following week on February 16, Ham again represented Peer during a meeting with Miller and Henson. The meeting was held in the customer counter's clerk's office at Respondent's behest. (tr. 211, 410). Henson testified, "we took them into the office." (tr. 366). Estimates for the office's dimensions varied. Supervisor Henson said it was 15'x8' while Miller stated it was 15'x12' (tr. 366, 507). Ham testified the portion of the office that the group was standing was around 4'x5' or 5'x5'. (tr. 132). The wood door to the office was closed. (tr. 59, 252). The office walls were permanent and believed to be drywalled. (tr. 253). After the four of them were in the office, standing about 5 feet from one another, according to Miller, 3 or 4 feet, according to Henson, and closer, according to Peer, Miller discussed Peer's methods from the

ride on the 10th. Miller then said, “because of that, I’m giving you a warning letter.” Ham testified that he was shocked at the warning letter and reflexively exclaimed, “You’ve got to be fucking kidding me; this is fucking bullshit.” (tr. 60, 145, 255, 256, 366, 493, 508; GC Exh 2). Henson testified that Ham yelled, “This is fucking bullshit. You guys can’t be fucking doing this.” (tr. 367). Peer testified Ham’s voice was “louder than normal, but I would not say that he was shouting or yelling.” (tr. 256, 257). Miller testified that Ham’s voice was raised at the meeting, but Randy Ervin, Respondent’s Labor Relations Manager conceded that Ham’s voice is generally louder than others’ voices, answering, “oh, absolutely” and stating “he talks loud when he’s trying to get his point across.” (tr. 493, 550, 551).

Supervisors told Ham to calm or quiet down; that he couldn’t say that (tr. 140, 367, 493). Peer recalled the supervisors say, “Whoa, whoa, whoa, you can’t talk like that, we’re done here.” (tr. 258, 283). While Henson stated that Ham continued to protest Respondent’s reasons for issuing discipline, Miller acknowledged that “at that point Mark (Ham) kind of calmed down, and the voices were more controlled after that.” (tr. 369, 493). In response to the direction that he “couldn’t say that” Ham replied, “I can say whatever I need to say as a steward; I have a right to say what I need to say. I didn’t say I was going to kill you, I didn’t threaten.” (tr. 60). After this exchange, the meeting continued without incident, “and the rest of the conversation, you know, Mark (Ham) had, you know, disagreed with the employee letter.” (tr. 60, 493).

While Respondent asserted at hearing that Ham’s arms were “going every which way” or made a chop-like motion, Ham and Peer testified Ham’s body language didn’t change much, if at all. Ham concedes he generally talks with his hands, and may have done so at the meeting. (tr. 63, 257, 368). Miller stated Ham’s hands were out and could only recall him making a “chop or like a point almost with the four fingers of his hand I guess.” (tr. 518, 519). Neither Henson nor

Miller detailed Ham's hand gestures in their memos to the file; while Henson noted a threatening body position, Miller only noted the language Ham used, despite testifying that he recorded the most important aspects of the meeting (tr. 509, Jt. Exhs 3, 4).² As the meeting ended, Ham stated, "Just so you know. . .Dennis Peer and I will be contacting the NLRB." Henson retorted, "Is that a threat?" Ham replied, no, he was just making him aware of it. Henson noted in his memo to the file regarding Ham stating he was going to file NLRB charges that he "asked Mark (Ham) why does he always threaten me, threaten me with that. He says he is not, and I told him that I'm taking it as a threat." (tr. 64; Jt. Exh 3). Despite his contemporaneous written memorialization that he was "taking it as a threat," Henson somehow didn't recall on the stand that Ham said anything about filing a Board charge during the meeting. (tr. 438, Jt. Exh 3). On the contrary, Respondent witness Miller, corroborating Henson's memo and Ham, recalled Ham saying that he was going to get the NLRB involved in this. (tr. 506, 512).³

Ham testified that their meeting did not disrupt work, and Peer testified that no employees were present to overhear the conversation. (tr. 65, 285). Respondent presented no evidence that the incident was disruptive to production or discipline.

C. *Ham Threatened with Unspecified Reprisals.*

The following day, February 17, Ham attended a grievance meeting with Respondent and officials from the Union, in his capacity as shop steward. (tr. 66-68). After the grievance meeting, Randy Ervin told Ham that he was "not allowed to act the way I acted the day before or

² Respondent expressed concern over Ham's rosy face color and that his veins were visible during this interaction. However, the record evidence establishes that it was not uncommon for Ham to have a flushed face, even when not involved in a heated conversation. Respondent witnesses Randy Ervin and Dave Miller testified they have both observed Ham turn red during meetings when he wasn't raising his voice, "I just think that's Mark." See generally (tr. 285, 368,470,547, 548).

³ While the employee witnesses' testimony was generally corroborative about the statements and events that occurred at the meetings, Respondent's versions were often inconsistent. For these and other reasons discussed herein, Respondent's versions of the meetings, to the extent they are inconsistent with other credible evidence, should not be credited.

say what I said the day before.” (tr. 69). Ham then said, “all I said is, ‘You got to be fucking kidding me, this is fucking bullshit.’” Ervin responded, “You can’t talk like that.” (tr. 70). Ervin then slid an Anti-Harassment Policy form across the table and told Ham to sign it. After Ham protested, Ervin declared, “If you don’t sign that form, I will do everything in my power to make sure something comes out of this.” (tr. 71). Though Ervin denied stating this, he conceded stating, “it’s his job to represent the union, but it’s my job to make sure he does it in a professional, respectful manner” and sliding the professional conduct policy to Ham. (tr. 438, 533, 534). Ervin also conceded he said at this meeting to Ham, “If you can’t act in good behavior and be professional in all your conduct, then this could lead to discipline up to and including discharge.” (tr. 534). Henson testified that he didn’t recall these threats but did remember Ervin stating, “You can’t be acting like that, this is a professional work environment, and I need you to read over this and sign it.” (tr. 378, 438). These admitted statements generally corroborate Ham’s testimony regarding unspecified reprisals.

The policy itself contains the following language, “Any employee who violates this policy may be subject to termination or other disciplinary action.” (Jt Exh. 10). Respondent admitted that it is an employee’s right to sign or not sign the policy. Ham testified that he reluctantly signed the document.⁴ (tr. 72, 73, 554; Jt. Exh. 10).

After Ham signed the policy, Ervin threatened Ham with the following: “I need to stop being the instigator, and that I write --most of my grievances are worthless, and that I write more grievances than anyone else in this district.” (tr. 73). Though Ervin did not testify that he said

⁴ Ham testified about why he was reluctant to sign the policy: “What I felt was I am employed as a steward and an employee, and as an employee, I believe I should follow all of those policies, and sometimes as a steward, you may have to raise your voice or, or make comments that give you an advantage, if you didn’t have that, you wouldn’t be able to do it, so I felt that they were making me sign that as a steward, which I didn’t want to do. As an employee, yes, I understand as an employee when I’m not acting as a steward, I must follow that policy.” (tr. 170-171).

this at the meeting, Respondent's own witness, Union business representative Dave Miller, testified that during February, March, and April, Ervin had told him "there are too many grievances coming out of the Coralville center and that Mark (Ham) is soliciting them all" and also on probably "half a dozen times" Ervin told Dave Miller that "a lot of Mark's grievances are frivolous." (tr. 474, 475). Ervin further testified that he had told Ham at one point, "Do you realize you have more grievances filed than anyone in my district?" (tr. 553).

Gary Mika recalled Ham being asked to sign the policy immediately after Ham mentioned that he may be filing an unfair labor practice charge. Mika recalled either Ervin or Henson stating, "[we're] sick and tired of you threatening us with NLRB charges. We consider that as harassment from you, and we're now asking you to sign the anti-harassment form." (tr. 297).

D. *Respondent Unilaterally Modified the Bathroom Break Past Practice.*

Since at least 1994, Respondent had not required employees to punch out for break time when they stop to use a restroom. (tr. 179). Sometime in mid-April this practice was apparently changed as a new policy had been implemented at the Coralville facility regarding bathroom breaks. Ham was approached during the week of April 23 by Dennis Peer and other employees regarding this change.. (tr. 79, 179). Ham testified that he has driven since 1994 and "I have never in any instance been told that I must punch in a break when I'm using the restroom." (tr. 179). The practice "was that as long as you use the nearest bathroom, you always had a right to go to the bathroom without punching in on break." (tr. 78). Respondent's Henson admitted that two long-term employees (other than Ham) told him that it was their understanding that they did not have to clock out for their breaks when using the bathroom. (tr. 416, 417). Miller stated, "there's nothing in the contract that specifically says what is or isn't a break . . ." (tr. 535). Respondent didn't put on any employee witnesses to rebut that the bathroom break policy was

changed, but merely put on one manager, Henson, to state what it thought was the unwritten policy, “If we have a delivery for that location, a gas station, QuikTrip, Casey’s or any other business and you need to use the bathroom, by all means don’t record that as a break, we’re already there for a stop, go ahead and use the restroom. If we make a special stop just to use the restroom, we need to record that time in our DIADS⁵ as a break.” (tr. 380, 436). In fact, supervisor Henson testified that he had to check with Ervin to make sure he was informing employees of the correct procedure, according to Respondent. (tr. 382). At no time was the Union informed of any change to the bathroom break policy. (tr. 299).

E. *April 27 Conversations Leading to Unlawful May Warning.*

On April 27, Ham met with supervisor Henson in his office regarding an issue with another driver. Ham recalled Union business agent Gary Mika was present, which Mika doesn’t recall.⁶ (tr. 80, 81, 299). Henson testified he couldn’t remember if he met Ham in the morning of April 27 regarding bathroom breaks, “I mean I could have mentioned something to him that morning about it, I’m not sure ... I can’t remember and tell you every conversation I had with everybody.” (tr. 415). According to Ham, after the other employee left, Ham said to Henson, “I’d done some research on the bathroom policy, and through OSHA, and that [you] are incorrect on this bathroom policy.” (tr. 76). Henson replied, “Why I had to take everything to an extreme?” (tr. 77). Ham replied, “I’m not taking it to extreme, I just have a bunch of people that are wanting to know what’s going on with the bathroom policy.” Henson replied, “I can see them maybe not going on break to go to the bathroom for number one, but they definitely have to go on break for a number two.” Henson then stated he would talk to Randy Ervin from labor about it. (tr. 77).

⁵ A device approximately 6”x12” used by Respondent to communicate with drivers and record various information (tr. 80, 81, 421).

⁶Mika testified that though he couldn’t recall whether he attended this short meeting from six months before, it was likely because “it’s been a while back . . .” (tr. 300).

After performing his daily run as a delivery driver, Ham received a message from Henson on his DIAD to speak with him in his office. (tr. 80, 382, 421). Ham met with Henson at Henson's office on the second floor of the facility. There was no one present near the office. (tr. 81).

According to Ham, Henson, sitting behind his desk, stated, "I talked with Randy (Ervin), and you, unless you have a delivery or a pick-up at a certain location, that's the only time you can use the bathroom without going on break." (tr. 82, 84). Henson recalled stating, "Hey, I got an answer from Randy, and I just wanted to explain what he said, and he agrees with me on what we're doing." (tr. 383). Ham responded by saying, "That's not right. That's not the information I have." (tr. 383). Henson claimed that the volume of Ham's voice was above normal conversation and that he was yelling. (tr. 385). The record evidence shows that in order to short circuit the conversation, Henson repeatedly told Ham to file a grievance to which Ham responded that he didn't want to do so, that he would take care of it a different way. Henson asked why? Ham responded, "I don't want to file a grievance, I want to take care of it a different way, and I'm tired of you treating people like shit." (tr. 82,180, 384). Henson then testified that Ham told him: I got 47 drivers down there that don't agree with you. (tr. 384, 386). Henson stated he told Ham to leave his office. (tr. 384). Ham then walked to the empty area outside the office and, when approximately 15 feet away, (Henson testified Ham walked back to the office, but "did not cross the threshold of the door"), Ham turned around and said to Henson, "By the way, thanks for not getting another eight-hour request⁷ today, this is the fifth one in a row that I've not received. Are you retaliating against me because I'm a union steward?" Ham said Henson replied that he didn't know the eight-hour request was made, while Henson testified, I don't know, Mark, we don't, I

⁷ 8 hour requests provide for a certain percentage of drivers, upon request, to have no more than 8 hours' worth of deliveries on a given shift. The 8 hour request procedures are contained in the CBA (Jt. Exh 1, Article 37(b), pg 129 first full paragraph) and the Regional supplement CBA (Jt. Exh 2, Article 27 Section 3, pg 234).

don't do it on purpose." That was the end of the conversation and Ham left the building. (tr. 83, 84, 88, 387, 427).

Henson stated that during this second portion of the meeting, when Ham came back after leaving the office that he leaned in with a red face and had his eyes open. (tr. 388). In Henson's memo for discipline, he noted nothing about Ham's demeanor as he asked about the 8 hour day or after, but only that Ham stared at him for a few seconds. (Jt. Exh. 11). From either the threshold of the office, according to Henson, or 15 feet away, according to Ham, Henson claimed "at that point, he just kind of stared me down, just like for two or three seconds." Conversely, Ham testified that he was looking at Henson in a normal way, "just any way you would look at anyone else." (tr. 99, 100, 183, 428).

Both prior to and after leaving Henson's office, Ham testified that while he was speaking that he was holding his DIAD and wasn't doing anything with his hands or arms, "I wasn't flinging them, or pointing them, or doing anything like that." He testified instead that his arms were probably at his side, and his body position didn't change at any point. (tr. 86-88). Henson also stated Ham had the DIAD in his right hand and in the next breath stated it could have been on his clip – he was just focused on that one hand making a chopping motion at each point that Ham made, each time "the hand went down as he was making, as he was making a point." (tr. 421, 422). Henson admitted that Ham's hand motions were not unusual for him, though exaggerated. (tr. 425, 426). Henson stated that during this meeting in his office, Ham was standing against the wall and at one point, "just kind of leaned forward a little bit, chest poked out . . ." and while Ham's "eyes were open," his "head was leaned in and his chest was leaned in." (tr. 367, 387, 388). Henson also testified that he was behind his big 3 foot wide desk, while Ham was

“standing on the opposite wall that the desk is on.” However, Henson also testified that Ham was about 2 feet from him. (tr. 382, 420). Respondent failed to reconcile this discrepancy.

F. Respondent Issued Ham a Warning.

On May 1, and during a meeting including supervisors John Henson, Adam Miller, and employee Erik Emerson, Henson handed Ham a warning letter (tr. 92; Jt. Exh 6). Henson began to read the anti-harassment policy aloud. (tr. 93; Jt. Exh 7). When he reached the word ‘leering,’ Henson said, “that’s what you did.” Despite it being in the policy itself, Henson didn’t remember using the word “leering.” (Jt. Exh 7, 514). Ham asked him if he realized he was reading from the sexual harassment section. (tr. 93). Henson replied, “That’s how I felt, I can feel however I want.” That was the end of the meeting. (tr. 95). At some point during the meeting, Henson said that Ham threatened and stared him down on April 27. (tr. 185, 187, 188). While Ham agreed that he said that as a steward he had the right to say anything as long as I’m not threatening you during the April 27 meeting, Henson instead stated that Ham said, during the May 1st meeting, that he could do anything he wanted short of threatening his life. (tr. 141, 392). Miller memorialized something similar. (Jt. Exh 5). Respondent made it clear that it had determined it would issue Ham a warning letter prior to the beginning of the meeting. (tr. 513).

Over the next few days, Ham sought clarification from management as to what the warning letter meant and what he was being asked to do or not do. (tr. 95). During a meeting on May 2, Henson in response merely gave Ham a copy of the same Anti-harassment policy, but gave no further explanation. (tr. 96).

On May 4, Ham again asked for clarification from management, to which Henson stated that the letter was written the way labor wanted it. Ham said, “It’s so vague that I feel like if I were to fart in a PCM, that I could be punished.” Henson laughed and said, “I just need you to be

professional. I don't want you raising your voice, and I don't want you swearing when you're doing your union stuff." That was the end of the meeting. (tr. 98, 99). This testimony was un rebutted by Respondent.

G. *Cursing is Common at Respondent's Facility.*

All witnesses testified that cursing occurs in the facility. Ham testified he had heard cursing about 25 times a day, "it's very frequent. It happens all the time," and has heard supervisors curse in front of employees (tr. 100, 101), and employees yell curses halfway down a 200 foot conveyor belt in supervisors' presence. (tr. 218-20). Peer stated cursing occurs on a daily basis and around supervisors. (tr. 260, 261). In his capacity as steward, Ham was aware of only a few instances where cursing had resulted in disciplinary meetings. (tr. 222-23). Henson testified he has heard the words "shit, bullshit maybe" and "fucking." (tr. 405, 406). Human Resources Manager Mike Arndt conceded that UPS tolerates the use of curse words at its facilities, "if it wasn't reported to someone as offensive, either the manager or myself, we would have no need to review the [anti-harassment] policy. If it was just a cuss word heard, we're not going to review the policy for every cuss word." (tr. 602, 603).

H. *Respondent's Henson says Steward Ham is Cordial when not Filing Grievances and Pushy When he Does.*

Though somewhat hard to decipher, the bottom line of Henson's testimony is that Ham is cordial unless he's advocating for employees and/or their contractual rights. Specifically, Henson stated he finds Ham at times pushy, at times cordial. He then clarified, that when Ham was filing grievances on behalf of the Union and membership "I'd say pushy when he's leading the union member on something to the effect that, that they can't review this with your because it's harassment and intimidation and coercion, and every time we review something with him,

that's what I call being pushy." (tr. 398). Yet, other times, Ham was "cordial." Henson described how Ham acted cordially when, "he wasn't over talking us, leading, leading his union membership into filing grievances to say that we're harassing, coercing them or intimidate – intimidation when we're not, we're simply reviewing the job-related methods with the, with the employees." (tr. 400). Yet after fully outlining when Ham was cordial or pushy, Henson suggested (contrary to the prior testimony on this issue) that he had no issues with his grievance filing. (tr. 374, 398-400).

I. *Other Instances Anti-Harassment Policy Applied.*

Respondent, through Mike Arndt, put on evidence of a number of employees who had been notified of the harassment policy at other Respondent facilities, including Coralville, presumably to justify threatening Ham with the same policy and later disciplining him. Respondent presented evidence of two employees cursing at one another at different facility; a manager and employee from a different facility getting into an argument; an employee out of the Coralville facility who made a derogatory comment about women and anatomy to a female coworker; another Coralville worker who made outbursts and acted unprofessional manner toward management; and an employee from a different facility who at a grievance meeting called a manager an idiot or incompetent. (Resp Exhs 3-10; tr. 439, 573-600).⁸

III. ARGUMENT

Respondent unlawfully threatened Ham and issued him a warning in violation of Sections 8(a)(1) and (3) of the Act. Respondent's threat of unspecified reprisals made in February, and warning issued in May were unlawful as they were in response to Ham's conduct while engaged in union and protected concerted activities.

⁸ Whether Respondent unlawfully disciplined employees at this or other facilities for similar conduct is completely irrelevant to the extent, as General Counsel contends, Ham was at all times engaged in protected, concerted activity which did not lose the protection of the Act.

The proper framework for analyzing this matter is provided by *Atlantic Steel*, not *Wright Line* and *Burnup & Sims*. However, even under the framework of these latter cases, Respondent violated the Act. Lastly, deferral of this matter is inappropriate because of Respondent's demonstrated enmity to statutory rights, because the threat and discipline issues are intertwined, and for procedural reasons as discussed below.

A. February Threat. Ham Threatened While Engaged in Protected Concerted Activities – Analyzed Under *Atlantic Steel*

As shop steward, Ham was present at four February meetings involving coworker Dennis Peer, which led up to a meeting the following week wherein Peer was disciplined. At the February 16 meeting, Ham, in his capacity as shop steward, raised his voice, cursed, fervently argued in defense of Peer, and threatened to file an unfair labor practice charge. The next day, Respondent threatened Ham with unspecified reprisals in retaliation for his steward activity and for threatening to file Board charges. In a directly analogous case, the Board recently opined:

“The Board’s well-established test for interference, restraint, and coercion under Section 8(a)(1) is an objective one and depends on ‘whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act.’” *ITT Federal Services Corp.*, 335 NLRB 998, 1002 (2001) (quoting *American Freightways Co.*, 124 NLRB 146, 147 (1959)). Applying this test, the Board has held that an employer violates Section 8(a)(1) by threatening employees with unspecified reprisals for engaging in discussions *protected under the Act*. (emphasis supplied) See, e.g., *Alaska Ship & Drydock*, 340 NLRB 874, 878 (2003) (respondent violated Section 8(a)(1) by its supervisor’s statement that an employee would be in “big trouble” if he discussed employee wages with another employee). Moreover, the Board has held that an unlawful directive can additionally violate Section 8(a)(1) when it is reinforced by an unlawful threat of reprisal. See, e.g., *SKD Jonesville Division L.P.*, 340 NLRB 101, 103 (2003) (respondent violated Section 8(a)(1) by issuing a written warning to an employee prohibiting her from discussing work-related matters with other employees and by conveying a threat of discipline or discharge if she did not comply).

Desert Springs Hospital Medical Center, 363 NLRB No. 185 (2016), slip op. at 2. Ham’s discussions were clearly discussions protected under the Act. However, Respondent contends that Ham’s discussions lost protection because of his conduct in the meeting specifically when Ham raised his voice and swore when protesting an unprecedented discipline issued to an

employee that he was representing. In analyzing these issues, the Board applies a “careful balancing” of four factors: 1) the place of discussion; 2) the subject matter of discussion; 3) the nature of the employee’s outburst; and 4) whether the outburst was, in any way, provoked by the employer’s unfair labor practices. *Atlantic Steel*, 245 NLRB at 816. Ham retained protection of the Act when he reacted to the shocking news that Peer would be receiving an unprecedented discipline⁹; despite Respondent’s repeated assurances in prior meetings that this would not occur.

1. *First Factor: Place of Discussion.*

The Board assesses whether the place of discussion undermined workplace discipline. *Overnite Transportation Co.*, 343 NLRB 1431, 1437 (2004) (favoring protection where was “no record evidence that other employees actually heard this exchange.”). The Board has also found an employee’s outburst against supervisors in a place where other employees overheard it could affect workplace discipline by undermining the authority of the supervisor. *DaimlerChrysler Corp.*, 344 NLRB 1324, 1329 (2005). In the instant matter, the conversation occurred in the clerk’s office, behind closed doors. Though the office is near to the customer counter and other work areas, there was no evidence that anyone heard Ham or the discussion. Indeed, even if someone had heard, Respondent cannot complain after it chose where to conduct the meeting. *See, In re Kiewit Power Constructors Co.*, 355 NLRB 708, 709 (2010) (finding protection when the place of discussion chosen by employer). Therefore, the first factor weighs strongly in favor of retaining protection.

2. *Second Factor: The Subject Matter of Discussion.*

Ham was acting in his capacity as shop steward at this meeting and was engaged in protected conduct. He expressed shock that Respondent disciplined Peer after repeatedly asserting that it

⁹ Respondent offered no evidence of a discipline that issued after an annual ride.

would not. Ham's remarks, though profanity-laced, were nevertheless spontaneous outbursts over what appeared to be a first-of-its-kind discipline stemming from an annual ride. Respondent couldn't even think of another instance when discipline was issued after an annual ride. Because Ham's response was clearly in his role as shop steward protecting employee rights, the second factor also weighs strongly in favor of protection.

3. *Third Factor: The Nature of the Employee's Outburst.*

The Board recognizes that "the protections Section 7 affords would be meaningless were we not to take into account the realities of industrial life and the fact that disputes over wages, hours, and working conditions are among the disputes most likely to engender ill feelings and strong responses." *Consumers Power Co.*, 282 NLRB 130, 132 (1986). The Board in *Consumers Power* continued, "the relevant question is whether the conduct is so egregious as to take it outside the protection of the Act. . . ." *Id.* at 132. This is balanced against "an employer's right to maintain order and respect." *Piper Realty*, 313 NLRB 1289, 1290 (1994); *see also, Woodruff & Sons*, 265 NLRB 345, 347 (1982). The Board assesses an employee's conduct using an objective rather than subjective standard. *Plaza Auto Center, Inc.*, 360 NLRB 972, 975 (2014). The Board has ruled on countless employee outbursts and does not strip protection lightly and would not in this case either. *Id.* at 974 (employee retained protection after calling supervisor, among other things a "fucking mother fucking" a "fucking crook," "asshole," where other factors weighed in favor of protection); *Winston-Salem Journal*, 341 NLRB 124, 126 (2004) *enf den. Media Gen. Operations, Inc. v N.L.R.B.*, 394 F3d 207, 208 (4th Cir 2005) (employee retained protection after cursing at a supervisor and "angrily pointed a finger at him."); *Stanford Hotel*, 344 NLRB 558, 559 (2005) (other *Atlantic Steel* factors weighed in favor of protection where employee called a supervisor "a fucking son of a bitch" while angrily pointing a finger at him.)

In the instant case, Ham was so shocked in response to this first-in-kind warning that he uttered, “you’ve got to be fucking kidding me; this is fucking bullshit.” After being told to quiet or calm down Ham said, “I can say whatever I need to say as a steward; I have a right to say what I need to say. I didn’t say I was going to kill you, I didn’t threaten you.” Far from being directed at anyone, the words were used as an exclamation and an explanation for his role as shop steward; hyperbole in tense situations is to be expected. This short outburst was followed by a continuation of the meeting, which Respondent’s Miller acknowledged, “and the rest of the conversation, you know, Mark (Ham) had, you know, disagreed with the employee letter.”

Much was made during the hearing about Ham’s body language by Respondent, yet Ham’s use of a chop-like motion, made at each of his argued points, was not objectively egregious. Miller described a “chop or like a point almost with the four fingers of his hand I guess.” Respondent made no claim whatsoever on the record that these motions were directed at them and conceded Ham often expressively uses his hands to get his point across. Respondent also made hay over the fact that Ham turned red during this meeting. However, the record makes clear that Ham often turns red even when not yelling, “it might turn a little bit red, but it ain’t like he’s sitting there yelling, I just think that’s Mark” (tr. 470). For these reasons, the third factor should weigh in favor of protection.

4. *Fourth Factor: Was Outburst in Response to Unfair Labor Practice?* The outburst was the immediate response to Respondent’s issuing Peer discipline after an annual ride. Not only has this never occurred before (Respondent couldn’t come up with an example), but Ham had over the previous week consistently asked Respondent, whether these meetings were going to result in discipline, and was repeatedly told “No.” Though not in response to a blatant unfair labor practice, Respondent was backtracking on its prior assurances, and indeed, was

issuing discipline for the first time ever – an arguable unilateral change to employees’ terms of employment. Therefore, this factor weights in favor of protection.

5. *Atlantic Steel Factors Conclusion.* Ham was engaged in protected activities during his outburst. Ham did not lose protection despite cursing, raising his voice, and arguing fervently against Respondent’s imposition of an unprecedented discipline. Under the factors set forth above, by his words and actions, Ham retained the Act’s protection.

6. *Respondent Made Unlawful Threats of Unspecified Reprisals.* On February 17, Respondent threatened Ham with unspecified reprisals for engaging in protected concerted activity and for stating he would be filing a charge with the Board. Because Ham was engaged in such activities, and as established above did not lose protection, the February 17th threat of unspecified reprisals chilled employees’ Section 7 protected activity. The Board’s well-established test for interference, restraint, and coercion under Section 8(a)(1) is an objective one and depends on “whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act. Applying this test, the Board has held that an employer violates Section 8(a)(1) by threatening employees with unspecified reprisals for engaging in discussions protected under the Act.” *Desert Springs Hosp. Med. Ctr.*, 363 NLRB at 2 (2016) (*internal citations and quotation marks omitted*).

In the instant case, Respondent’s Randy Ervin admittedly said, “It’s [your] job to represent the union, but it’s my job to make sure he does it in a professional, respectful manner,” and further, “If you can’t act in good behavior and be professional in all of your conduct, then this could lead to discipline up to and including discharge.” Despite Respondent conceding employees did not have to sign such policies, crediting Ham, Ervin said, “If you don’t sign that form, I will do everything in my power to make sure something comes out of this.” Further

crediting him, Ervin told Ham “I need to stop being the instigator, and that I write --most of my grievances are worthless, and that I write more grievances than anyone else in this district.” (This closely mirrors the un rebutted testimony by Respondent’s witness Dave Miller about what Ervin had told him half a dozen times during this same time period). This statement in connection with the “to make sure something comes out of this” comment and the policy, which includes language, “Any employee who violates this policy may be subject to termination or other disciplinary action” would tend to chill Section 7 activities. In addition to Gary Mika’s recollection that Ervin said he was sick of Ham filing Board charges as he slid the policy to him, this February 17 meeting was on the heels of the prior day’s comment (memorialized in Henson’s memo to the file) that Henson told Ham that he was “taking it as a threat” the fact that Ham threatened to file a Board charge. In context, Henson’s “taking it as a threat” comment, the issuance of the anti-harassment policy, requiring Ham to sign it or Ervin would “make sure something comes out of this,” and Ervin’s further comments that Ham needed to act respectfully and professionally as union steward or discipline or termination would result, interferes, restrains, or coerces employees’ Section 7 activity and Respondent violated Section 8(a)(1). *Desert Springs Hospital Medical Center*, 363 NLRB No. 185, slip op. at 3 (2016)(Respondent threatened employee with unspecified reprisals when it told her not to discuss her discipline with others and that "it could be trouble" for her if she did so).

B. May 1st Warning. Ham Was Clearly Engaged in Protected Concerted Activities and the Warning was Issued in Retaliation for Such Activity; Analyzed under Atlantic Steel.

Henson summoned Ham to his office after his shift on April 27 to inform him “what we’re doing” with the bathroom break policy so Ham could relay as much to the bargaining unit. Ham made it very clear during this meeting he was talking on behalf of the unit, “I got 47 drivers

down there that don't agree with you." Ham was engaged in union and protected concerted activities. Moreover, Ham's attempt to enforce his request for an 8-hour workday, a right grounded in the CBA's Article 37(b), was concerted. *Interboro Contractors, Inc.*, 157 N.L.R.B. 1295, 1298 (1966). For the reasons articulated below, Ham retained protection of the Act under *Atlantic Steel*.

1. *First Factor. The Place of Discussion.*

This meeting was held upstairs in Henson's office, an otherwise empty area. There is no evidence that anyone overheard the meeting. Therefore, this factor weighs strongly in favor of retaining protection. *Noble Metal Processing, Inc.*, 346 NLRB 795, 800 (2006) (no evidence of disruption of work processes favors protection).

2. *Second Factor. The Subject Matter of Discussion.*

Henson summoned Ham to discuss the change to the bathroom break policy and whether Ham should file a grievance over such change. As a shop steward, Ham has a vested interest in confronting changes to policy. The two also discussed Ham's request for an 8-hour day, which is incorporated in CBA Article 37(b). Both of these subjects are squarely terms and conditions of employment going to the heart of Section 7 activity. Therefore, this factor also weighs strongly in favor of retaining protection.

3. *Third Factor. The Nature of the Outburst.*¹⁰

The only objective evidence presented by Respondent for Ham's conduct during this meeting was that Ham's chest and head at one point were leaned in, that his face was red, he had visible veins, his eyes were open, that he was making each of his points by using a chop-like motion and that he said the following comments in response to the perceived change to the bathroom break

¹⁰Please refer to Section III.A.3 above for additional law on third factor.

policy: “That’s not right, That’s not the information I have”; “I don’t want to file a grievance, I want to take care of it a different way, and I’m tired of you treating people like shit”; and, “I got 47 drivers down there that don’t agree with you.” The Board assesses an employee’s conduct using an objective rather than subjective standard. *Plaza Auto Center, Inc.*, 360 NLRB at 975. Though Henson testified that he felt cornered in his office and that Ham “just kind of stared at me, gave me a little look, a death stare, just stared at me for like two or three seconds,” the record is devoid of objective evidence Ham did anything threatening and thus Henson’s subjective belief is of no moment. Nothing could be more subjective than what is conveyed by looking at someone. While it is clear Ham may have been a little exercised, Ham’s conduct did not rise to the level that would lose him protection of the Act. Because Ham’s conduct was not objectively opprobrious, this factor weighs in favor of retaining protection of the Act.

4. *Fourth Factor, Was the Outburst in Response to Unfair Labor Practice?*

The Record established the bathroom break policy was a change from past practice. The Board has defined a past practice when an activity occurs with such regularity and frequency, and over a long period of time, that employees could reasonably view it would continue as a term and condition of employment. *See, In re Philadelphia Coca-Cola Bottling Co.*, 340 NLRB 349, 353 (2003). The record testimony was that at least three long-term employees did not believe that the past practice was that drivers needed to clock out for a break when using the bathroom; Ham stated, “I’ve driven since 1994, I have never once been told that I must punch in to break when I’m using the restroom.” Despite working for Respondent since 1997, Henson himself testified that he had to check with Randy Ervin to see if he was informing employees of Respondent’s position on the breaks correctly. At the very least, there was a past practice that employees did not clock out for bathroom breaks and Henson was informing Ham that this was now changed.

Respondent put on no direct testimony that it communicated the change of policy to the Union prior to implementing it and its Union witness testified that he did not receive such communication. Though not alleged as a Section 8(a)(5) violation, this was an arguable unilateral change, and the employees obviously viewed it as such. Thus, this factor weighs in favor of retaining protection of the Act.

5. *Atlantic Steel Factors Conclusion.* Here, Ham was engaged, as shop steward, in protected concerted activities during conversations, when he had the alleged outburst. Ham did not lose protection despite by leaning in, having his eyes open, and his face turning red, or even by “leering” for a few seconds.

C. *Affirmative Defense – Wright Line.*¹¹ This matter should be analyzed under *Atlantic Steel*, as Ham was disciplined “ . . . for conduct that is part of the *res gestae* of protected concerted activities, the pertinent question is whether the conduct is sufficiently egregious to remove it from the protection of the Act.” *Stanford New York, LLC*, 344 NLRB 558 (2005). Under *Wright Line*, once the General Counsel makes an initial showing that Union animus was a motivating factor, the burden shifts to Respondent to prove it would have taken the same action absent the employee’s activity. *Wright Line*, 251 NLRB 1083 (1980).

Here there can be no dispute Respondent knew Ham was engaged in Union and protected concerted activities as shop steward. Respondent’s own witnesses provides ample evidence animus toward such activity: 1) Henson deemed Ham “cordial” when he wasn’t getting employees to file grievances over harassment and intimidation by supervisors and “pushy” when he was doing so; 2) Dave Miller testified that during February, March, and April, Randy Ervin had told him “there are too many grievances coming out of the Coralville center and []Mark

¹¹ General Counsel has not alleged in its Complaint any of Respondent’s rules or policies as unlawful, but rather has demonstrated Respondent has used the anti-harassment policy in such a way in the instant matter to inhibit Section 7 activity.

(Ham) is soliciting them all.” See, *Champion Parts Rebuilders, Inc.*, 260 NLRB 731, 733 (1982) (union animus where supervisor told employee to “quit filing so many grievances” or she would be fired).

Respondent put into evidence various disciplines (from various facilities including Coralville) where Respondent issued the anti-harassment policy. One Memo to the File by Adam Miller from April 4, 2017, was for Pat Yoeger who “was obviously agitated and using a raised voice.” (Resp Exh 7); another memo to the file by supervisor Kelsey Stoltenberg states “This is not the first time I have been harassed by Paul Yoerger, In 2016 there was an instance he walked down the belt yelling and calling the pre-load supervisors names (worthless, idiots etc . . .)” (Resp Exh 8). The record shows Yoerger was asked to review the anti-harassment policy. If anything, the examples presented by Respondent show disparate treatment of shop steward Ham – he was disciplined while others were only asked to review the anti-harassment policy.

Respondent failed to present evidence that it would have issued Ham discipline regardless of his activity and therefore did not meet its burden under *Wright Line*. Section 8(a)(1) and (3) violation should be found.

D. Affirmative Defense - *Burnup & Sims*. The *Burnup & Sims* analysis is not suited for this case where there is no good faith mistaken belief about Ham’s conduct. Henson was in the room when the conversation occurred. As the Board in *Hitachi Capital Am. Corp* neatly summarized, “Under *Burnup & Sims*, an employer violates Sec. 8(a)(1) by disciplining an employee based on a good-faith but mistaken belief that the employee committed misconduct while engaged in protected activity. Thus, assuming good faith, the issue under *Burnup & Sims* is whether the employer made a mistake as to the occurrence of the alleged misconduct. There is no evidence of a good-faith mistake here. The Respondent knew precisely what actions [the

discriminatee] had taken, and those actions were protected.” *Hitachi Capital Am. Corp*, 361 NLRB 123 fn 4 (2014). For these reasons, Respondent’s *Burnup & Sims* argument should be rejected. *NLRB v. Burnup & Sims*, 379 U.S. 21 (1964).

E. Affirmative Defense – Deferral.¹²

1. Deferral is Inappropriate When Allegation Relates to Access to the Board. The Board affirmed an administrative law judge’s determination not to defer alleged violations of Section 8(a)(4) in order that it may “protect the integrity of rights guaranteed to employees under the statute. . . .” *Wabeek Country Club*, 301 NLRB 694, 699 (1991). In the instant case, because it is alleged Respondent threatened Ham in violation of Section 8(a)(1), in part at least, due to his expressed intention to file a Board charge, the matter should similarly not be deferred.¹³

The Board does not defer allegations when closely related to otherwise non-deferrable allegations. *See, Burndy LLC*, 364 NLRB No. 77 (2016). Respondent disciplined Ham in May for purportedly breaching the anti-harassment policy it required him to re-sign in February. Because the May warning and February threat are inextricably intertwined, the May warning is also inappropriate for deferral.

2. Respondent Has Shown Enmity to Section 7 Rights.

¹² The credible evidence at trial is that the parties have a long standing unwritten past practice in Iowa whereby they do not defer anything less than a discipline. Respondent’s own witness Dave Miller stated, “. . . there’s nothing in writing, it’s been in effect for years, is that we don’t grieve warning letters at the state level, they’re automatically protested.” Miller continued, “we don’t take it because a warning letter is just bringing attention to the issue. You’re not losing nothing. So what we – there’s an agreement between the Company and the Union that warning letters are just automatically protested, thus, if an individual now gets suspended or terminated for the same type of issue, we have the right to bring the warning letter into the case to see if its relevant.” (tr. 463, 464). The Union’s Gary Mika stated “No, in Iowa we do not file grievances on warning letters, because we have an agreement with all of our employers that a warning letter is automatically protested.” (tr. 324, 325). Ham testified, “we don’t file grievances over warning letters.” (tr. 149). Despite presenting no documentary evidence in support of this, Respondent’s Ervin stated he receives grievances over warnings letters “all the time.” (tr. 558).

¹³ The complaint alleges that Respondent threatened Ham with unspecified reprisals for engaging in protected concerted activity and for filing unfair labor practice charges, stemming from the February meetings. Clearly, in addition to Ham’s protestations over the discipline issued to the other employee, Respondent expressed animosity toward Ham’s grievance filing and charge filing activities, as is amply demonstrated by the record.

The Board does not favor deferring to arbitration where the Respondent has demonstrated its willingness to threaten and discipline employees for engaging in protected rights and filing grievances. *See, North Shore Publishing Co.*, 206 NLRB 42, 43 (1973) (charge alleging discharge of employee for filing a grievance should not be deferred); *Key Food Stores*, 286 NLRB 1056, 1072 (1987) (Board found arbitrator award repugnant which it upheld discharge based directly on steward's protected concerted activity of filing grievances). As detailed above, Respondent has shown a propensity to violate the Act with regard to Ham's actions as shop steward and has further shown it believes Ham files too many grievances, and finds him "pushy" when grievances are filed over harassment by supervisors. Therefore, such threats and discipline at issue in this case should not be forced into the grievance and arbitration procedure, where Respondent has expressed enmity for the process.

3. Respondent Has Not Waived Procedural Question Regarding Timeliness.

Deferral under *Collyer* requires Respondent to affirmatively waive time limits for processing a grievance under the CBA. *United Technologies Corp*, 268 NLRB 557, 560 fn. 22 (1984). In the instant case, on the timeliness issue, Respondent witness Randy Ervin stated, "So at this point the Company would probably take a stance that it's untimely, but we would still visit that." (tr. 559). Moreover, Respondent stated it would present a motion before the close of the record indicating its willingness to meet deferral requirements. (tr. 21, 22). It did not do so.

4. The Collective Bargaining Agreement Limits an Arbitrator's Remedial

Authority. The Board's typical remedies for violations of the Act include 'cease and desist' orders. The Board has found deferral inappropriate when a CBA limits appropriate remedies. *Clarkson Industries, Inc.* 312 NLRB 349, 351 (1993) (no deferral where CBA provides: "The arbitrator shall not have the right or authority to subtract from or alter any provision of this

Contract, *nor may the arbitrator make any recommendations for future action* by the Company or the Union) (emphasis original). In this case, the CBA's Article 8 Section 5 states, in part, "The arbitrator shall have the authority to apply the provisions of this Agreement and to render a decision on any grievance coming before him/her but shall not have the authority to amend or modify this Agreement or to establish new terms or conditions of employment." Because this language similarly limits an arbitrator's ability to fashion any appropriate remedy for the alleged threat," deferral is not appropriate.

Table of Authorities

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APPENDIX PROPOSED NOTICE

FEDERAL LAW GIVES YOU THE RIGHT TO:

- Form, join, or assist a union;
- Choose a representative to bargain with us on your behalf;
- Act together with other employees for your benefit and protection;
- Choose not to engage in any of these protected activities.

WE WILL NOT do anything to prevent you from exercising the above rights.

WE WILL NOT threaten you for engaging in union activity.

WE WILL NOT discipline you because of your union activities..

WE WILL NOT in any like or related manner interfere with your rights under Section 7 of the Act.

WE WILL NOT require you to sign the UPS Professional Conduct and Anti-harassment policy in response to you engaging in Union activity or protected concerted activity.

WE WILL NOT require you to sign the UPS Professional Conduct and Anti-harassment policy in response to you threatening to file charges with the National Labor Relations Board.

WE WILL remove from our files all references to the UPS Professional Conduct and Anti-harassment policy signed by Mark D. Ham on February 17, 2017 and **WE WILL** notify him in writing that this has been done and that this UPS Professional Conduct and Anti-harassment policy will not be used against him in any way.

WE WILL remove from our files all references to the May 1, 2017 warning letter issued to Mark D. Ham and **WE WILL** notify him in writing that this has been done and that the warning letter will not be used against him in any way.

UNITED PARCEL SERVICE, INC.

(Employer)

Dated: _____ **By:** _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. We conduct secret-ballot elections to determine whether employees want union representation and we investigate and remedy unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below or you may call the Board's toll-free number 1-866-667-NLRB (1-866-667-6572). Hearing impaired persons may contact the Agency's TTY service at 1-866-315-NLRB. You may also obtain information from the Board's website: www.nlr.gov.

Federal Office Building
212 Third Avenue South, Suite 200
Minneapolis, MN 55401-2657

Telephone: (612)348-1757
Hours of Operation: 8 a.m. to 4:30 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the above Regional Office's Compliance Officer.

PROPOSED CONCLUSIONS OF LAW

1. Respondent, United Parcel Service, Inc., has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. Respondent violated Section 8(a)(1) of the Act on February 17, 2017, by threatening an employee with unspecified reprisals if the employee engaged in Union activity and/or filed charges with the National Labor Relations Board.
3. Respondent violated Section 8(a)(1) of the Act by disciplining Mark Ham on May 1, 2017, in retaliation for his protected concerted activities.
4. Respondent violated Section 8(a)(3) and Section 8(a)(1) of the Act by disciplining Mark Ham on May 1, 2017, in retaliation for his union activities.
5. The above-described unfair labor practices affect commerce within the meaning of Section 2 (6), and (7) of the Act.

PROPOSED REMEDY

Having found that Respondent has violated the Act, I shall recommend that it cease and desist therefrom and take certain affirmative action necessary to effectuate the Act's purposes.

Respondent shall also be ordered to remove from its files any references to the May 1, 2017 discipline and signed February 17, 2017, anti-harassment policy of Mark Ham and to notify him in writing that this has been done and that the discipline and anti-harassment policy will not be used against him in any way.

Respondent shall post an appropriate informational notice, as described in the attached appendix. This notice shall be posted at the Respondent's facility wherever the notices to employees are regularly posted for 60 days without anything covering it up or defacing its contents. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. In the event that during the pendency of these proceedings the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 17, 2017. When the notice is issued to the Respondent, it shall sign it or otherwise notify Region 18 of the Board what action it will take with respect to this decision

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended

PROPOSED ORDER

Respondent, United Parcel Service, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from
 - a. Threatening employees with unspecified reprisals because they engaged in Union activity and/or threatened to file charges with the National Labor Relations Board.
 - b. Disciplining or otherwise discriminating against employees because they engage in protected concerted activities.
 - c. Disciplining or otherwise discriminating against employees because they engage in union activities.
 - d. In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.
2. Take the following affirmative action necessary to effectuate the policies of the Act:
 - a. Within 14 days of this Order, remove from its files any reference to the unlawful discipline and resigned anti-harassment policy issued to Mark Ham, and within 3 days thereafter, notify him in writing that this has been done and that the discipline and resigned anti-harassment policy will not be used against him in any way.

- b. Within 14 days after service by the Region, post at its facility in Coralville, Iowa, copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices in each language deemed appropriate shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice in each appropriate language, to all current employees and former employees employed by the Respondent at any time since February 17, 2017.
- c. Within 21 days after service by the Region, file with the Regional Director for Region 18 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

CERTIFICATE OF SERVICE

Pursuant to the National Labor Relations Board's Rules and Regulations, Section 102.114, a true and correct copy of the foregoing Counsel for the General Counsel's Brief to the Administrative Law Judge was e-filed with the Division of Judges and served via electronic mail on this 22nd day of December, 2017, on the following parties:

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